Supreme Court, U.S.
FILED
APR 26 1995
OFFICE OF THE CLERK

(2)

CASE NUMBER 94-1585
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

LEON KANOIVICKI and
MAURICIO KANOIVICKI,

Petitioners,

v.

BETTYE JEAN GREEN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

George E. Barrett
BARRETT, JOHNSTON & PARSLEY
217 Second Avenue North
Nashville, Tennessee 37201
(615) 244-2202

Counsel of Record for Respondents

William L. Harbison
L. Webb Campbell II
Elizabeth B. Thompson
SHERRARD & ROE, P.L.C.
424 Church Street
Nashville, Tennessee 37219
(615) 742-4200

H. Thomas Parsons
PARSONS & NICHOLS
104 West Main Street
Manchester, Tennessee 37355
(615) 728-1316

BEST AVAILABLE COPY

63 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant the petition, when the federal question petitioners Leon and Mauricio Kanoivicki (the "Kanoivickis") ask this Court to review -- that they were deprived of due process because they were not permitted to relitigate a final judgment for the validity of a will in this *in rem* will contest proceeding -- was never addressed by any Tennessee court and was never even presented by the Kanoivickis to the Tennessee trial court or the Tennessee Court of Appeals.

2. Whether, even if some federal question as to whether the Kanoivickis received due process had been presented to and decided

by the Tennessee courts (which it was not), this Court should decline to review that question when the Kanoivickis have admitted that they had notice of all proceedings in Tennessee courts but chose not to attempt to participate in the will contest until after its conclusion.

3. Whether the Kanoivickis' petition for certiorari is untimely because the time period for its filing was not tolled by their "petition to rehear" the Tennessee Supreme Court's denial of their application for permission to appeal, when Tennessee law does not recognize such "petitions to rehear."

LIST OF PARTIES TO THE PROCEEDING

1. Mauricio Kanoivicki, Petitioner
2. Leon Kanoivicki, Petitioner
3. Bettye Jean Green, Respondent
4. Martin King, Respondent
5. Deborah Lapidus Fisher, Respondent
6. Lisa Lapidus Green, Respondent
7. Barry Lapidus, Respondent[1]

---

[1] The Kanoivickis' petition also lists Carolyn Higdon and the Main Street Church of Christ as respondents. This is not correct. Carolyn Higdon and the Main Street Church of Christ were contestants in this will contest, but their involvement ended on December 6, 1993 when the Tennessee Supreme Court denied their applications for permission to appeal the grant of summary judgment upholding the validity of one of the wills at issue. That decision is not at issue in this petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTIONAL GROUNDS	8
CONSTITUTIONAL PROVISIONS INVOLVED	11
STATEMENT OF THE CASE	11
SUMMARY OF THE ARGUMENT	32
ARGUMENT	36
A. No Federal Question Is Presented to This Court	36
B. The Kanoivickis Had Both Notice and Ample Opportunity to Be Heard, and Their Right to Due Process Was Not Violated	42

C. The Kanoivickis' Petition for Certiorari Was Not Timely 49

CONCLUSION 52

APPENDIX A1
(Index to Appendix Included at Appendix)

TABLE OF AUTHORITIES

Page

Federal Cases

Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) 37

Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) 36, 37

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) 43, 44

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 44

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) 36, 37

Tennessee Cases

Basden v. Lawson, 1992 W.L. 332089 (Tenn. 1992) 49, 50

Civil Serv. Merit Bd. v. Burson, 816 S.W.2d 725 (Tenn. 1991) . . 39

Jones v. Witherspoon, 187 S.W.2d 788 (Tenn. 1945) 47

Lease v. Tipton, 722 S.W.2d 379 (Tenn. 1986) 50

Lillard v. Tolliver, 154 Tenn. 304, 285 S.W. 576 (1926) . . . 29,46

Petty v. Call, 599 S.W.2d 791, 793 (Tenn. 1980) . 22,41,46,47

Arnold v. Marcom, 352 S.W.2d 936 (Tenn. Ct. App. 1961) 47

Green v. Higdon, 891 S.W.2d 220 (Tenn. Ct. App. 1994) 2-3,28-31,46

Green v. Higdon, 870 S.W.2d 513 (Tenn. Ct. App. 1993) 6,21-24,41

Mallicoat v. Poynter, 722 S.W.2d 681 (Tenn. Ct. App. 1986) 39,42

Orange Tee, Inc. v. The Cain Partnership, Ltd., 1992 W.L. 387342 (Tenn. Ct. App. 1992) 50

Stacks v. Saunders, 812 S.W.2d 587 (Tenn. Ct. App. 1990) 41

Constitutional Provisions

U.S. Const., amend. 5 8,11

U.S. Const., amend. 14, § 1 . 8,11

Statutes and Rules

28 U.S.C. § 1257 8

28 U.S.C. § 1331 8

Supreme Court Rules 10 8

Supreme Court Rules 13.4 49

Supreme Court Rules 14.1(h) . . . 38

Tenn. Code Ann. § 32-2-101 . . . 13

Tenn. Code Ann. § 32-4-100 . . . 13

Tenn.R.App.P. 11 10,31,49,50

Tenn.R.App.P. 39 50

Tenn.R.App.P. 39 Advisory Commission Comment 50

Other Authorities

I H. Phillips & J. Robinson, Pritchard on Wills § 338 47

OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the courts below at issue in this proceeding include:

1. On June 4, 1993, the Circuit Court for Coffee County, Tennessee granted respondents' motion to dismiss an "Answer and Statement of Contest" filed by the Kanoivickis on November 9, 1992, after the will contest was concluded in the Circuit Court and was on appeal. Green, et al. v. Higdon, et al., No. 24,954 (Coffee County Circuit Ct. June 4, 1993), Appendix to Petition A-69.[2]

---

[2] To the extent that the materials from the record in Tennessee courts cited in this brief are not reproduced in the appendix to the Kanoivickis' petition, they are reproduced in the appendix to this brief. References to documents included in the appendix in this brief are to

2. On July 27, 1994, the Tennessee Court of Appeals affirmed the Circuit Court's dismissal of the "Answer and Statement of Contest," holding that under Tennessee law the Kanoivickis could not relitigate a final determination of the validity of a will in an *in rem* will contest proceeding. Green

---

"A__." References to documents included in the appendix to the Kanoivickis' petition are to "Appendix to Petition A-__."

Respondents object, however, to the misleading manner in which the Kanoivickis have reproduced the documents included in their appendix. The Kanoivickis have added bold type throughout their appendix emphasizing language they believe important. See Kanoivickis' Petition for Certiorari to the Supreme Court of the State of Tennessee ("Petition") at A-2, A-4, A-5, A-7, A-11, A-17, A-67, A-70. Such bold type was *not* included in the original documents, and respondents ask the Court to ignore the Kanoivickis' additions when reviewing their Petition.

v. Higdon, 891 S.W.2d 220 (Tenn. Ct. App. 1994).

3. On December 5, 1994, the Tennessee Supreme Court denied the Kanoivickis' application for permission to appeal. Green, et al. v. Higdon, et al., No. 01-A-01-9309-CV-00396 (Tenn. Dec. 5, 1994), Appendix to Petition A-80.[3]

4. On December 28, 1994, the Tennessee Supreme Court denied the Kanoivickis' "petition to rehear" the denial of permission to appeal. Green, et al. v. Higdon, et al., No. 01-A-01-9309-CV-00396 (Tenn. Dec. 28, 1994), Appendix to Petition A-81.

---

[3] The Kanoivickis first raised their claim of denial of due process in their application to appeal the Tennessee Court of Appeals' decision to the Tennessee Supreme Court.

The Kanoivickis' Petition, however, largely ignores these decisions and appears to seek this Court's review of the following, already final, decisions of Tennessee courts, by which they now claim that they were denied due process under the United States Constitution:

1. On December 19, 1991, the Circuit Court for Coffee County, Tennessee granted summary judgment on respondents' motion, finding that contestant Carolyn Higdon had presented no evidence sufficient to create a genuine issue of material fact regarding the claim that the will executed by decedent David King on January 18, 1985 was invalid. Appendix to Petition A-3. On May 27, 1992, the Circuit Court amended its order. Appendix to Petition A-11. On June 1, 1992,

the Circuit Court ruled that contestant the Main Street Church of Christ had likewise presented no evidence sufficient to create a genuine issue of material fact that David King's January 18, 1985 will was not valid. A1. On October 20, 1992, the Circuit Court denied the Church of Christ's motion to alter and amend and dismissed the will contest. Appendix to Petition A-65. Green, et al. v. Higdon, et al., No. 24,954 (Coffee County Circuit Ct. Dec. 19, 1991 & May 27, June 1, October 22, 1992).[4]

---

[4] The Kanoivickis, who admit they received copies of respondents' motion for summary judgment, Carolyn Higdon's and the Main Street Church of Christ's responses in opposition, and the Circuit Court's opinions and orders, filed no response to the motion for summary judgment and presented no evidence supporting their contention that the January 18, 1985 will was invalid. The

2. On August 4, 1993, the Tennessee Court of Appeals affirmed the Circuit Court's decision granting summary judgment, and held that, under Tennessee law, summary judgment in a will contest (an *in rem* proceeding) was properly rendered for or against the validity of a particular will, not for or against a particular contestant. The determination, the Court of Appeals held, "is binding on all interested parties whether they are parties to the record or not." Green v. Higdon, 870 S.W.2d 513 (Tenn. Ct. App. 1993).

Kanoivickis first attempted to present such evidence -- in response to respondents' objection to their late-filed "Answer and Statement of Contest" -- after the Circuit Court's grant of summary judgment had become final and was on appeal.

3. On December 6, 1993, the Tennessee Supreme Court denied the applications of Carolyn Higdon and the Main Street Church of Christ to appeal. Green, et al. v. Higdon, et al., No. 01A01-9209-CV-00369 (Tenn. Dec. 6, 1993), A5.

4. On February 14, 1994, the Tennessee Supreme Court denied a motion to intervene filed by the Kanoivickis on December 7, 1993, one day *after* the applications for permission to appeal were denied and the appeal was concluded. The Tennessee Supreme Court also denied a "petition to rehear" the denial of the applications of Carolyn Higdon and the Main Street Church of Christ to appeal, filed by the Kanoivickis despite their failure to participate in the appeal.

Green, et al. v. Higdon, et al., No. 01A01-9209-CV-00369 (Tenn. Feb. 14, 1994), A6.

JURISDICTIONAL GROUNDS

The Kanoivickis contend that this Court has jurisdiction pursuant to 28 U.S.C. § 1331. Section 1331, which provides that *district courts* have original jurisdiction of federal questions, has no application to this Court's jurisdiction over decisions of state courts of last resort. The Kanoivickis also contend that this Court has jurisdiction under the due process clause of the United States Constitution and Rule 10 of the Supreme Court Rules, neither of which govern the jurisdiction of this Court.

Respondents presume that the Kanoivickis are attempting to assert that this Court has jurisdiction over a decision of a state court of last resort on a federal question pursuant to 28 U.S.C. § 1257. As respondents set forth below, however, the federal question the Kanoivickis ask this Court to review -- their claim that they were denied due process under the United States Constitution because they were not permitted to relitigate the final judgment that David King's January 18, 1985 will is valid -- was never addressed or even cited by any Tennessee court, and was never even presented to the Coffee County Circuit Court or the Tennessee Court of Appeals. The decisions below rested solely on Tennessee law, no determination of federal law was necessary or involved,

and this Court has no jurisdiction of the Kanoivickis' Petition.

In addition, this Court lacks jurisdiction because the Kanoivickis' Petition was not timely filed. The Kanoivickis filed their Petition 89 days after the Tennessee Supreme Court denied their "petition to rehear" the denial of their Tenn.R.App.P. 11 application for permission to appeal. As respondents set forth below, the Kanoivickis' "petition to rehear" did *not* toll the time within which the Kanoivickis were required to file their Petition in this Court, because Tennessee law does not recognize a "petition to rehear" the Tennessee Supreme Court's denial of an application for permission to appeal. The Kanoivickis' Petition, which was filed well over 90 days after the

initial denial of the Tenn.R.App.P. 11 application, is not timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The Kanoivickis contend that this case involves the fifth and fourteenth amendments to the United States Constitution. The full text of these amendments is reproduced at pages 3-4 of the Kanoivickis' Petition.

STATEMENT OF THE CASE

The Kanoivickis ask this Court to review a will contest decided under Tennessee law. The decedent, David King, died leaving three wills, including a holographic will leaving the bulk of his estate to Carolyn Higdon. The other two wills -- which were prepared and executed by Mr. King after the holographic will -- leave the bulk

of Mr. King's estate to respondents, who are Mr. King's relatives.

After these conflicting wills had been submitted to the Probate Division of the Coffee County Chancery Court for probate, respondents filed a notice of contest of the holographic will on December 7, 1990, contending among other things that Mr. King's January 18, 1985 will revoked the earlier holographic will. A8. Carolyn Higdon also filed a notice of contest of the later wills propounded by respondents, contending that Mr. King lacked testamentary capacity or was unduly influenced at the time they were executed. A11. By order dated January 17, 1991, the Probate Court certified this will contest to the Coffee County Circuit

Court. A13.[5] The Main Street Church of Christ (which received specific bequests in two of Mr. King's wills) indicated its intent to participate in the will contest by filing a "bond of will contestant and beneficiary" in the Probate Court on February 7, 1991. A18.

The Kanoivickis, who live in Argentina, are also relatives of Mr. King. The Kanoivickis receive small bequests under two of the wills executed by Mr. King.[6] If all of these wills

---

[5] Under Tennessee law in effect when the will contest was initiated, proceedings to probate wills were required to be filed in Probate Court (a division of Chancery Court in Coffee County), while only Circuit Courts had jurisdiction over will contests. Tenn. Code Ann. §§ 32-2-101, 32-4-101.

[6] Mr. King's January 18, 1985 will leaves $10,000 each to the Kanoivickis, and his April 8, 1985 will leaves them $5,000 each. These wills also contain small bequests to certain

were to be found invalid, however, the Kanoivickis would receive a much larger portion of the estate under Tennessee's intestacy provisions. Not surprisingly, their position in this will contest is that none of Mr. King's wills is valid. The Kanoivickis admit that they received all notices of the probate proceedings and the will contest. Petition at 8-10.

On February 4, 1991, the Kanoivickis filed a document in the Chancery Court probate proceeding. A21. This document (which has been translated from its original Spanish) admits that the Kanoivickis had been informed of Mr. King's death and of the legal proceedings surrounding his wills. The document asserts that the Kanoivickis

---

friends and acquaintances of Mr. King.

intended to challenge all of Mr. King's wills, and requests that the court grant the Kanoivickis until March 30, 1991 to "allow adequate access to the legal proceedings pertaining to David King's inheritance and permit us to hire the services of legal counsel to defend our interest in said inheritance."

As the Kanoivickis candidly admit, after they filed this document acknowledging notice of the proceedings, indicating their position on the wills, and asking for a month's time to retain counsel, they did *not* in fact retain counsel for over two years. After filing this February 4, 1991 document in Chancery Court, the Kanoivickis did not file any other documents or participate in any way in the will contest until "well after the ruling had been entered on the summary judgment motion" filed by

respondents. Petition at 9. The Kanoivickis never filed one document in Circuit Court -- the court in which the will contest was proceeding -- until after the Circuit Court granted summary judgment and entered its order dismissing the contest.

On August 8, 1991, respondents filed a motion for summary judgment in the will contest, seeking summary judgment "against the validity of the holographic will propounded by [Carolyn Higdon]." Appendix to Petition A-1. In their motion and brief, respondents contended that at least one of the two wills of Mr. King executed after the holographic will, the January 18, 1985 will, was valid, and that there was no evidence sufficient to create a genuine issue of material fact that the January 18, 1985 will was either obtained by

undue influence or executed while Mr. King lacked testamentary capacity. A27-A79; Appendix to Petition A-2.[7]

Both Carolyn Higdon and the Main Street Church of Christ filed responses in opposition to this motion, and submitted evidence -- including trial transcripts from an earlier related proceeding and the deposition of Mr. King's physician before his death -- that they contended created genuine issues of material fact precluding the entry of summary judgment on the issues of testamentary capacity and undue influence. A80-A117 (Carolyn Higdon's response); A118-121 (Church of Christ's response). The Kanoivickis, however,

---

[7] Respondents contended, therefore, that the holographic will leaving the bulk of Mr. King's estate to Carolyn Higdon (who was not related to Mr. King in any way) was revoked as a matter of law by a later valid will.

despite the fact that they have admitted receiving copies of the motion for summary judgment and supporting and opposing papers, did not obtain counsel, filed no response in opposition, and submitted no evidence on the issues of testamentary capacity or undue influence. Petition at 8-9.

On December 19, 1991, the Circuit Court held that Carolyn Higdon had submitted nothing creating a genuine issue of material fact against the validity of the January 18, 1985 will, and that the holographic will was revoked as a matter of law. Appendix to Petition A-3 through A-7. On May 27, 1992, the Circuit Court amended this order, on the motion of Carolyn Higdon, to clarify that its holding was only that "Carolyn Higdon's affirmative defenses [of] lack of testamentary

capacity and undue influence with regard to Mr. King's January 18, 1985 will do not present genuine issues for trial." Appendix to Petition A-11.

Three days later, on June 1, 1992, the Circuit Court held that the Main Street Church of Christ, like Carolyn Higdon, had submitted nothing creating a genuine issue of material fact against the validity of the January 18, 1985 will. A1.[8] The Church of Christ filed

---

[8] The Kanoivickis' repeated contention in their petition that the Circuit Court awarded summary judgment *only* against Carolyn Higdon, therefore, is inaccurate, misleading, and at best disingenuous. Petition at i, 5, 6, 7, 8, 9, 11, 12, 14. The Kanoivickis apparently chose to ignore the fact that the Circuit Court also granted summary judgment against the Main Street Church of Christ because the Church of Christ, unlike the Kanoivickis, recognized that the validity of one of Mr. King's wills was at issue in the motion for summary judgment, and that if the January 18, 1985 will were to be held valid its position in favor of the holographic will would fail. The Church of Christ

a motion to alter or amend this ruling, A122, which the Circuit Court denied on October 20, 1992.[9] In this order, the Circuit Court found that there were "no

---

elected to participate in the summary judgment proceedings. It is clearly bound by the results, while the Kanoivickis, who were in an identical position and received identical notice of the proceedings, argue that they should not be bound because they chose to ignore the adjudication of their rights as interested parties.

[9] Respondents' response to the Church of Christ's motion to alter or amend argued -- contrary to the Church of Christ's position that summary judgment was improperly granted against it because it was not named in the original motion -- that respondents' motion for summary judgment had sought an adjudication of the validity of the January 18, 1985 will. The Church of Christ, as a contestant to that will, therefore had a burden to come forward with evidence sufficient to create a genuine issue of material fact as to its invalidity. A135-36. Even if the Kanoivickis had not had notice prior to being served with this document that the proceedings in Circuit Court were important to their interests, they undoubtedly received such notice at this time.

longer any contestants before the Court to the will propounded by [respondents]," and dismissed the contest. Appendix to Petition A-67 through A-68.

Both Carolyn Higdon and the Church of Christ appealed. The Kanoivickis, despite receiving an order from the Circuit Court dismissing the will contest and holding that there were no remaining contestants, did not appeal, and made no attempt to participate in the appeal until after it was concluded.

On August 4, 1993, the Tennessee Court of Appeals affirmed the Circuit Court's decision. Green v. Higdon, 870 S.W.2d 513 (Tenn. Ct. App. 1993). Citing well-established principles of Tennessee law -- which holds that a will contest is a proceeding *in rem* the results of which are binding on all

interested parties, see, e.g., Petty v. Call, 599 S.W.2d 791, 793 (Tenn. 1980) -- the Court of Appeals indicated that summary judgment in a will contest was properly entered for or against the validity of a will, rather than for or against a particular contestant:

> [I]t [is] not proper to render a judgment against a party in a will contest, the proper judgment being for or against the will, or whether or not a valid will was made by the deceased. A judgment against the proponent of a will could be interpreted as a judgment against a will.
>
> A will contest is a proceeding *in rem*, being the estate of the deceased. . . . A proceeding for probate is not an action between parties, but an action *in rem* involving the distribution of the *res*.
>
> The probate of a will is a proceeding *in rem* and operates upon the subject matter. It is binding on all interested parties whether they are parties to the record or not.

> On [the issue "Did he make a will or not?"], the judgment need not be for or against a party, but for or against the propounded will. In the present cases, three wills were propounded and duly contested . . . . *The effect of the judgment of the Trial Court is to uphold the January 18, 1985 will, and to reject the previous holographic will as revoked. The judgment should so state.*
>
> No procedure or process is known to this Court whereby a will contest may result in upholding a will as to some but not all beneficiaries, or sustains a contest as to one but not all contestants.

Green, 870 S.W.2d at 519-20, 523-24 (emphasis supplied; citations omitted). After reviewing the evidence in the record to determine that it agreed with the Circuit Court that there was no evidence sufficient to allow a reasonable jury to conclude that Mr. King lacked testamentary capacity or was unduly influenced when he executed the January 18, 1985 will, the Court of Appeals held that the "judgment of the

Trial Court is modified to declare that all wills executed prior to January 18, 1985 are revoked by a valid will executed on that date," thus revoking the holographic will which was executed before the January 18, 1985 will. Id. at 524-25.

The Tennessee Supreme Court denied the applications of Carolyn Higdon and the Main Street Church of Christ to appeal this decision on December 6, 1993. A5. On December 7, 1993, the day *after* the appeal was concluded with the Supreme Court's denial, the Kanoivickis filed a motion to intervene in the Supreme Court. A144. On December 12, 1993, the Kanoivickis -- who had not participated in any manner in the appeal prior to filing the motion to intervene -- filed a "petition to rehear" the denial of the

applications filed by Carolyn Higdon and the Church of Christ.[10] A162. On February 14, 1994, the Tennessee Supreme Court denied the Kanoivickis' motion and petition. A6.[11] The 1993 decision of the Tennessee Court of Appeals -- which the Kanoivickis now contend is the decision which impermissibly broadened the Circuit Court's holding and denied them due process under the United States

---

[10] Carolyn Higdon and the Church of Christ did not participate in this "petition to rehear."

[11] In its order denying the Kanoivickis' "petition to rehear" its denials of Carolyn Higdon's and the Main Street Church of Christ's applications for permission to appeal, the Tennessee Supreme Court recognized that petitions to rehear such denials were not recognized in Tennessee law: "There is no provision in the Rules of Appellate Procedure for rehearing of denial of a T.R.A.P. 11 application for permission to appeal, therefore the petition to rehear must be denied." A7.

Constitution -- is now final and unreviewable.[12]

After the Circuit Court dismissed the will contest in October 1992, and while Carolyn Higdon's and the Main Street Church of Christ's appeal from the grant of summary judgment was pending, the Kanoivickis filed their *first* document in the Circuit Court, entitled "Answer and Statement of Contest." A169. In this document, the Kanoivickis asserted that none of Mr. King's wills were valid and that Mr. King died intestate.

Respondents moved to dismiss this "Answer and Statement of Contest," on the grounds that the Kanoivickis, as

---

[12] Surprisingly, the Kanoivickis' Petition scarcely mentions the 1994 decision of the Court of Appeals which the Kanoivickis are ostensibly asking this Court to review.

interested parties in the *in rem* will contest, were bound by the judgment upholding the validity of the January 18, 1985 will and dismissing the contest. Respondents also moved for summary judgment against the Kanoivickis, asserting that, even if the Kanoivickis were not bound by the final order in the will contest, no genuine issues of material fact existed with regard to Mr. King's alleged intestacy. The Kanoivickis' filings in Circuit Court opposing these motions *never* asserted that they felt they had been denied due process by the proceedings and never cited any provision of the United States Constitution. A179-A210. The Circuit Court, on June 4, 1993, granted respondents' motion to dismiss the Kanoivickis' "Answer and Statement

of Contest." Appendix to Petition A-69 through A-70.

The Kanoivickis appealed this dismissal. Their brief in the Court of Appeals, like their filings in Circuit Court, never asserted that they believed they had been denied due process under the United States Constitution, and never made the argument, on which their Petition depends, that the August 1993 decision of the Court of Appeals impermissibly broadened the Circuit Court's grant of summary judgment. A211-A273.

On July 27, 1994, the Tennessee Court of Appeals affirmed the Circuit Court's dismissal of the "Answer and Statement of Contest." Green v. Higdon, 891 S.W.2d 220 (Tenn. Ct. App. 1994). The Court of Appeals cited "ancient" Tennessee law and "fixed" rules holding

that a will contest is a proceeding *in rem*, and a judgment in a will contest is binding on all the world. Id. at 222 (citing Petty, 599 S.W.2d at 793; Lillard v. Tolliver, 154 Tenn. 304, 285 S.W. 576 (1926)). Under this law, the Kanoivickis and anyone else who might have a claim to Mr. King's estate were bound by the already final decision upholding the validity of the January 18, 1985 will:

> [T]hese principles dispose of the [Kanoivickis'] contention that they may relitigate the questions of undue influence and lack of testamentary capacity with respect to the January 18, 1985 will. *When the [Circuit C]ourt held that there was no proof to support these defenses, a decision now affirmed on appeal [in the 1993 decision of the Court of Appeals], that decision bound all who were interested in the estate.*

Id. (emphasis supplied).

Not surprisingly, given the fact that the Kanoivickis never argued that the 1993 opinion of the Court of Appeals deprived them of due process, the Court of Appeals' 1994 opinion never addressed this question, and does not contain the words "due process" or mention the United States Constitution. Id. The Court of Appeals did, however, reject the argument that the Kanoivickis deserved relief because they were somehow misled by the parties and the Circuit Court into thinking that they need not take an active role in the proceedings until after summary judgment for the validity of the January 18, 1985 will was entered:

> Although they do not couch their argument in terms of estoppel, the [Kanoivickis] argue that they were misled by appellees' counsel and by the court's orders into thinking that their rights would not be adversely affected by the will

> contest. We cannot draw that conclusion from the record. *It is true that the parties to the contest anticipated a protracted trial and communicated that fact to the appellants, but we see nothing in the record that would justify a belief by a reasonably prudent person that he could wait for the conclusion of the will contest before taking any action.*

Id. (emphasis supplied).

The Kanoivickis filed an application for permission to appeal this decision to Tennessee's Supreme Court pursuant to Tenn.R.App.P. 11. In their application, the Kanoivickis argued *for the first time* that the *1993* decision of the Court of Appeals deprived them of due process because it impermissibly broadened the Circuit Court's grant of summary judgment. A274. The application still does not,

however, cite *any* provision of the United States Constitution.[13]

The Supreme Court declined to permit the Kanoivickis to appeal, in a four-line opinion not mentioning due process or the United States Constitution, on December 5, 1994. Appendix to Petition A-80. Without comment, the Supreme Court also denied the Kanoivickis' "petition to rehear" its decision not to allow them to appeal on December 28, 1994. Id. A-81.

SUMMARY OF THE ARGUMENT

This case presents no federal question. The Kanoivickis contend that the *1993* decision of the Tennessee Court of Appeals -- which has long since

---

[13] The first time the Kanoivickis have cited the United States Constitution is in their Petition for certiorari in this Court.

become final and non-reviewable and in which the Kanoivickis did not participate in any way -- deprived them of the due process guaranteed by the United States Constitution by impermissibly broadening the Circuit Court's grant of summary judgment. The Kanoivickis never presented this claim to any Tennessee court until they asked the Tennessee Supreme Court to review the *1994* decision of the Court of Appeals holding that under Tennessee law they and all other interested parties were bound by the 1993 decision.

Not surprisingly, therefore, no Tennessee court has addressed the Kanoivickis' federal due process claim. Instead, the decisions all were based on well-established Tennessee law governing will contests. Under Tennessee law, a will contest is a proceeding *in rem*,

and it is binding on all interested parties to the contest. The Kanoivickis were interested parties -- who, moreover, admittedly had notice of the contest -- and they were bound, under Tennessee law, by the results of the contest upholding the validity of the January 18, 1985 will. No federal question was addressed by these decisions, and no federal question was necessary or integral to the courts' holdings.

Even if some federal due process question was decided or necessary to the Tennessee courts' holdings (which it was not), the Kanoivickis' Petition presents no reason why this Court should exercise its discretion to review this case. Indeed, their misleading and inaccurate description of the proceedings below nonetheless admits the essential fact

that disposes of their due process argument -- that they had notice not only of the contest but of all documents filed in that case, including the motion for summary judgment, supporting and opposing papers, and opinions and judgments. The Kanoivickis had both notice and a meaningful opportunity to be heard, but chose to ignore the proceedings until after their rights had been concluded. As the Tennessee Court of Appeals stated, "nothing in the record . . . would justify a belief by a reasonably prudent person that he could wait for the conclusion of the will contest before taking any action."

Finally, the Kanoivickis' Petition was not timely, because it was filed more than 90 days after the Tennessee Supreme Court denied their application

for permission to appeal. Because Tennessee law does not recognize petitions to rehear denials of applications for permission to appeal, the Kanoivickis' petition was a nullity and did not toll the time within which they were required to file their Petition in this Court.

ARGUMENT

A. No Federal Question Is Presented to This Court.

This Court will decide decisions of a state court of last resort only if the federal question sought to be reviewed was presented to and decided by that court. 28 U.S.C. § 1257; Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L.Ed.2d 474, 487 (1987). To obtain

review, it must affirmatively appear from the record as a whole, either expressly or by clear implication, that the federal claim was adequately presented to the state court and was passed upon by that court. Webb, 451 U.S. at 496; 101 S.Ct. at 1891, 68 L.Ed.2d at 397; Rotary Club, 481 U.S. at 550, 107 S.Ct. at 1948, 95 L.Ed.2d at 487 (no federal question when "appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal").

When reviewing state court decisions, the Supreme Court will not decide federal claims that were not pressed or passed upon below. Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 78-79, 108 S.Ct. 1645, 1650-51, 100 L.Ed.2d 62, 72-73 (1988). For this

reason, the Rules of this Court direct petitioners, in their "Statement of the Case," to

> specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Supreme Court Rules 14.1(h). For understandable reasons, the Kanoivickis' Petition ignores this direction.

The federal question the Kanoivickis now urge this Court to review is their claim that the 1993 decision of the Tennessee Court of Appeals denied them due process under the United States Constitution, by

applying well-settled Tennessee law to conclude that the Circuit Court's determination that no genuine issue of material fact existed on testamentary capacity and undue influence was a determination that Mr. King's January 18, 1985 will was valid. It is undisputed that the Kanoivickis never mentioned this claim and never used the words "due process" until they asked the Tennessee Supreme Court for permission to appeal the 1994 Court of Appeals' decision affirming dismissal of their "Answer and Statement of Contest."[14]

---

[14] Under Tennessee law, therefore, the Kanoivickis waived their due process claim. See Civil Serv. Merit Bd. v. Burson, 816 S.W.2d 725, 734 (Tenn. 1991) (issue not raised or argued in trial court waived, and Supreme Court refused to consider). In Mallicoat v. Poynter, 722 S.W.2d 681, 682 (Tenn. Ct. App. 1986), the Tennessee Court of Appeals refused to consider an argument by an interested party that he had been denied due process by the conclusion of a will

It is also undisputed that the Kanoivickis never cited the United States Constitution until they filed their Petition in this Court.

The Tennessee Supreme Court declined to permit the appeal, and did not mention the due process claim. No other Tennessee court -- including the Court of Appeals in the 1994 decision that is the final decision of a Tennessee court on the merits of the Kanoivickis' claim -- has addressed the claim or mentioned either due process or the United States Constitution.[15]

---

contest without notice to him, in part because "constitutional issues cannot be raised for the first time on appeal unless a statute is clearly and blatantly unconstitutional."

[15] It is undisputed, moreover, that the Kanoivickis had notice of their federal due process claim -- release of the 1993 Court of Appeals' opinion of which they now complain -- in ample time to have raised the claim for the

Rather, the decisions of Tennessee courts that the Kanoivickis ask this Court to review address solely questions of Tennessee state law, and are based on well-established Tennessee law principles, including the salient principle that a will contest is a proceeding *in rem* and that decisions in will contests are binding on all interested parties, even if those parties do not have notice of the proceedings.[16] See Petty, 599 S.W.2d at 793; Stacks v. Saunders, 812 S.W.2d 587, 590 (Tenn. Ct. App. 1990);

---

consideration of the Court of Appeals in the 1994 opinion. The first Court of Appeals' decision was entered on August 4, 1993. Green, 870 S.W.2d at 513. The Kanoivickis' first brief in the Court of Appeals for the 1994 decision was filed on October 7, 1993.

[16] The Kanoivickis, however, admit that they had notice of the will contest proceedings. Petition at 8-10.

Mallicoat v. Poynter, 722 S.W.2d 681, 682 (Tenn. Ct. App. 1986). No federal question was presented or decided by the Tennessee courts, and this Court should decline to grant the Kanoivickis' Petition.

B. The Kanoivickis Had Both Notice and Ample Opportunity to Be Heard, and Their Right to Due Process Was Not Violated.

The Kanoivickis, as they must, assert that the Court should grant their Petition because the Tennessee Supreme Court "has decided a federal question in a way that conflicts" with the decisions of another state court of last resort, a United States Court of Appeals, and this Court. Petition at 2. In addition to ignoring the fact that the Tennessee Supreme Court never addressed or decided any question of federal law, the Kanoivickis cite no case law to

support their argument that their claim of denial of due process is worthy of this Court's consideration.

Rather, the Kanoivickis' Petition admits the fact that is dispositive of their claim that they were denied due process by the proceedings in Tennessee court: that they received notice of the will contest proceedings and copies of all papers filed in those proceedings, including the motion for summary judgment, Carolyn Higdon's and the Church of Christ's oppositions to that motion, and the Circuit Court's orders. Petition at 9.

Due process requires that a party be given notice and an opportunity to be heard before its rights are adjudicated. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct.

1554, 56 L.Ed.2d 30 (1978). As this Court pointed out in Craft:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.*

Id. at 13, 98 S.Ct. at 1562, 56 L.Ed.2d at 40 (emphasis supplied) (quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950)).

Here, the Kanoivickis indisputably received such notice, but chose to ignore the proceedings while their rights were concluded. In this regard, it is significant to contrast the participation of the Kanoivickis with the Main Street Church of Christ. The Church of Christ recognized that the

validity of Mr. King's January 18, 1985 will was at issue in the motion for summary judgment, and that its position supporting the holographic will would fail if the January 18, 1985 will were to be held valid. The Church of Christ chose to participate in the summary judgment proceedings and in the initial appeal of this case. Clearly the Church of Christ is bound by the results. The Kanoivickis cannot claim that they are not bound and were deprived of due process, simply because they chose not to participate while the validity of the wills at issue was being adjudicated.[17]

---

[17] If the Kanoivickis' position is correct, there are also several other beneficiaries under Mr. King's wills who could claim that they, too, may relitigate the validity of the January 18, 1985 will. It is to prevent precisely this result that Tennessee law "does not contemplate a series of will

Rather, because the Kanoivickis were fully informed of the progress of the proceedings, they, like Carolyn Higdon and the Church of Christ, had a duty to participate if they so chose and were bound by the determinations of the Circuit Court and the Court of Appeals. The Kanoivickis' contention that they were somehow misled by orders of Tennessee courts recognizing them as participants in the will contest is without merit. As the Tennessee Court of Appeals stated in its 1994 decision, "nothing in the record . . . would justify a belief by a reasonably prudent person that he could wait for the conclusion of the will contest before taking any action." Green, 891 S.W.2d at 222.

---

contests." See, e.g., Lillard, 255 S.W. at 579; Petty, 599 S.W.2d at 793.

In addition, the Kanoivickis' argument that the 1993 Court of Appeals decision affected their rights by broadening or extending the Circuit Court's decision is wrong as a matter of law. As the Tennessee law governing will contests recognizes, a will is either valid or invalid. Accordingly, in an *in rem* will contest, a judgment is either for or against the validity of a will, and is binding on all interested parties. Petty, 599 S.W.2d at 793. The contestants place the will before the court, and ask the court to decide, once and for all, the issue of the validity of the will. I H. Phillips & J. Robinson, Pritchard on Wills § 338; Jones v. Witherspoon, 187 S.W.2d 788, 791 (Tenn. 1945); Arnold v. Marcom, 352 S.W.2d 936, 938 (Tenn. Ct. App. 1961).

The 1993 Court of Appeals decision correctly recognized the effect of these legal principles, and properly concluded that, as a matter of law, the Circuit Court's decision that no evidence in the record created a genuine issue of material fact on the issues of testamentary capacity and undue influence with regard to the January 18, 1985 will was a decision for the validity of that will, binding on all interested parties, including the Kanoivickis. The 1993 Appellate Decision, contrary to the Kanoivickis' argument, did not broaden or extend the Circuit Court's holding at all, but clarified the effect of that holding under the established rules of law governing will contests.

For two reasons -- because the Kanoivickis received ample notice and

opportunity to be heard throughout the pendency of the proceedings, and because the decision that the Kanoivickis claim deprived them of due process did nothing but recognize the effect of well-established Tennessee law -- the Kanoivickis' contention that they were denied due process presents nothing that could justify this Court's discretionary review. The Petition should be denied.

C. **The Kanoivickis' Petition for Certiorari Was Not Timely.**

Generally, a petition for certiorari filed within 90 days of a timely petition to rehear a state court judgment is timely. Supreme Court Rules 13.4. In Tennessee, however, no petition to rehear a denial of a Tenn.R.App.P. 11 application for permission to appeal is permitted. See Basden v. Lawson, 1992 W.L. 332089

(Tenn. 1992) ("Tenn.R.App.P. 39 contemplates a petition to rehear a final judgment and is inappropriate as a vehicle to reconsider a denial of a Rule 11 application") (copy included at A302); Orange Tee, Inc. v. The Cain Partnership, Ltd., 1992 W.L. 387342 (Tenn. Ct. App. 1992) ("There is no provision in T.R.A.P. 11 authorizing a petition to rehear denial of an application for permission to appeal") (copy included at A319); Tenn.R.App.P. 39 Advisory Commission Comment ("The Supreme Court generally disfavors petitions to rehear following denials of applications for permission to appeal").[18]

---

[18] In one published opinion, however, the Tennessee Supreme Court has apparently addressed a petition to rehear denial of permission to appeal without addressing the propriety of such a petition. Lease v. Tipton, 722

Indeed, the Tennessee Supreme Court, in denying the first "petition to rehear" filed by the Kanoivickis in this case -- from the denial of Carolyn Higdon's and the Main Street Church of Christ's applications for permission to appeal -- stated: "There is no provision in the Rules of Appellate Procedure for rehearing of denial of a T.R.A.P. 11 application for permission to appeal, therefore the petition to rehear must be denied." A7.

The Kanoivickis' "petition to rehear," therefore, was a nullity, and did not serve to toll the time for filing their Petition to this Court. They filed their Petition well over 90 days after December 5, 1994, the date on which the Tennessee Supreme Court

---

S.W.2d 379 (Tenn. 1986).

denied their application for permission to appeal. The Petition is not timely, and should be rejected for this reason alone.

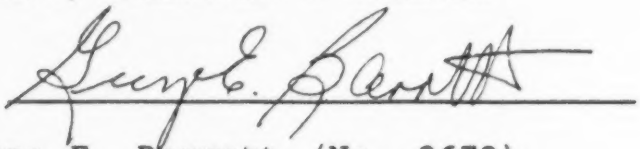
CONCLUSION

The Kanoivickis' assertion that they were denied due process was neither timely presented to nor decided by any Tennessee court. There is no federal question for this Court to review. More importantly, the Kanoivickis' due process claim is completely without merit, given their candid admission that they received notice of all the proceedings below but chose not to participate until after their rights were concluded. Finally, the Kanoivickis' Petition was not timely

filed. This Court should decline to grant certiorari.

Respectfully submitted,

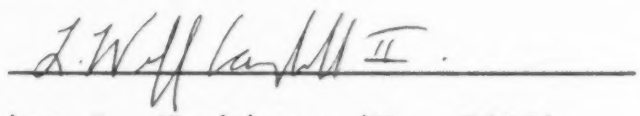
BARRETT, JOHNSTON & PARSLEY

By: 

George E. Barrett (No. 2672)
217 Second Avenue North
Nashville, Tennessee 37201
(615) 244-2202

Counsel of Record

SHERRARD & ROE, P.L.C.

By: 

William L. Harbison (No. 7012)
L. Webb Campbell II (No. 11238)
Elizabeth B. Thompson (No. 14505)
424 Church Street, Suite 2000
Nashville, Tennessee 37219
(615) 742-4200

PARSONS & NICHOLS

By: H. Thomas Parsons
by LWI

H. Thomas Parsons (No. 2571)
104 West Main Street
Manchester, Tennessee 37355
(615) 728-1316

Attorneys for Respondents